Fountain Court

Stock market regulation and litigation

UK LISTINGS REFORM: VIEW FROM THE BAR

COMMENTARY

August 2024

I. INTRODUCTION

1. The reforms to the UK listing rules ('UKLR') which went live on 29 July 2024 aim to assist the UK economy be more competitive globally, and to help it grow[2]. First, by widening our markets to a more diverse range of entrepreneurs and companies by making UK equity capital markets more accessible, dynamic and attractive to them at entry and on a continuing basis. Second, by such means, promoting greater investment opportunities in UK-listed companies for domestic and foreign investors. The reforms are designed to align UK capital markets' standards with standards elsewhere in the world.

2. In combination with other structural changes, the reduction of regulatory barriers to listing and capital raising promises to be a pivotal moment for UK listing and the invigoration of the UK capital markets ecosystem more widely. But, if it works, and it is a big 'if', the reforms also promise more litigation and regulatory enforcement activity[3]. After all, a philosophy that permits greater autonomy and encourages more drivers to take to the road must expect more rule-breaking and crashes.

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[1]The author would like to acknowledge the considerable assistance provided by Annie Davis in the preparation and drafting of this note. Annie, who was a Judicial Assistant in the Court of Appeal between 2022-2023, will start pupillage at Old Square Chambers in October 2024.

[2]PS24/6, Foreword; CP23/31, p143, Cost Benefit Analysis at [3].

[3]PS24/6, Foreword.

3. UKLR transfers historic corporate risk management and investor protection controls away from previously strict requirements concerning eligibility, and corporate governance through *ex ante* shareholder approval, to a looser, more permissive framework where trust, confidence, judgement and competence within UK-listed companies and their boards gain an even greater premium for investors and regulators alike.

4. Under UKLR, the IPO process has been relaxed and streamlined for applicants, and investor protection is organised around a broad framework of high-quality market disclosures concerning auditing and other periodical reporting of a listed company's financial position, performance and ESG performance[4], market disclosures of transactions representing 25%+ of the company's value[5] and related party transactions[6], *ad hoc* disclosures of price-sensitive information (the suppression of which constitutes market abuse)[7], and further annual disclosures, statements and 'declarations of effectiveness' by boards concerning their stewardship and promotion of the long-term success of a listed company[8], its purpose, values and strategy, its governance arrangements and its internal controls[9].

5. In tandem with the 'enhanced' disclosure regime under UKLR (most of which pre-exists UKLR), it is expected that active and constructive engagement and stewardship by companies and their investors and stakeholders will take place[10] in compliance with the UK Corporate Governance Code ('UK CGC')[11] and UK Stewardship Code ('UK SC')[12]. The hope and belief is that institutional investors have sufficient ability and heft to steer companies they co-own, and that the mutual benefits in play will lead to good outcomes for UK-listed companies and investors, whether institutional or retail[13].

6. The attempt to induce the world's youngest, brightest and agile tech, life science and fast-growing companies to 'Choose UK' is welcomed by many, and especially the newly elected UK government and its 'national mission' to encourage economic growth. But while the jury will be out for many IPO experts and investors on whether the reforms have worked, and how smart the new framework really is, if UKLR works it seems likely it will lead to more securities and other litigation by shareholders, and to more complaints to, and enforcement action by, the FCA[14] and other agencies for breaches of various rules.

7. That greater autonomy, discretion and self-certification and assessment are frequently seen as breeding grounds for opacity, not transparency, signals that eligibility and other corporate statements are liable to abuse. Prospectuses, listing particulars and market disclosures are prone to contain untrue or misleading statements and omissions, and to causing harm and losses, or potential harm and losses, to investors. In practice, corporate

[4] CA06, Parts 15-16; ss89A and 89C FSMA, DTR; UKLR 6.6.
[5] 'Significant transactions', UKLR 7.3.1R; DTR.
[6] UKLR 8.2.
[7] UK MAR, art. 17; DTR.
[8] CA06, Part 15; UK CGC 2024, Introduction; UKLR 6.6.
[9] In sum, the 'corporate governance rules' as that term is defined under s89O FSMA and UKLR, and applied in DTR. See UK CGC 2024 which is applicable for accounting periods beginning on or after 1/1/25, and Provision 29, which is applicable for accounting periods beginning on or after 1/1/26.
[10] PS24/6, Foreword; CP23/31 at [6.58-59].
[11] UK CGC 2018, PRIN D, Provision 3; UK CGC 2024, Introduction, PRIN D and Provision 3.
[12] UK SC 2020, AOAM PRIN 9-12.
[13] PS24/6, Foreword, and 'Wider context' at [1.29-34].
[14] PS24/6 at [1.11].

governance in issuers varies, and is liable to abuse. UK auditing is replete with examples of lapses of independence, objectivity, and conflicts of interest. As new risks and vulnerabilities emerge from high leverage and other exposures, some companies fail to identify them (adequately or at all), fail to adapt to them (adequately or at all), or turn a blind eye to them. As well as all these risks, the import of each corporate disclosure will attract even greater investor scrutiny, monitoring and due diligence on account of the dilution of investor influence.

8. That these vulnerabilities can or will have to be mitigated by the threat and use of, among other things:

8.1. a growth in securities litigation, and most notably under s90 and s90A of and Sch 10A to FSMA[15],
8.2. regulatory complaints to, and enforcement action by, the FCA for breaches of UKLR, PRR, DTR, UK MAR, and other respective regulators for breaches of relevant professional conduct rules,
8.3. complaints and referrals to the Insolvency Service for corporate abuse and director disqualification actions, and
8.4. prosecution by the FCA and other law enforcement agencies for securities fraud and related crimes,

to deter and enforce UKLR ethics and its desired outcomes, is obvious.

9. As such, now is an opportune moment to consider, in broad terms, the metes and bounds of UKLR, some of the potential civil, criminal and regulatory liabilities for UK-listed companies, their owners, controllers and directors, and some potential mitigants that they might put in place to avoid a crash or fine, or worse.

10. In keeping with the general emphasis placed by the FCA and other UKLR commentary on the listing of equity shares in commercial companies ('ESCC') category, this note shall do the same.

II. UKLR: A SUMMARY

11. In summary, UKLR introduces a more flexible approach to admission to the UK's official list, provides more flexibility on enhanced or weighted voting structures, and a conspicuously more permissive approach to significant, and related party, transactions undertaken by UK-listed companies.

(1) The more flexible approach to admission and enhanced voting structures

12. The removal, in UKLR, of previously strict eligibility requirements for commercial companies (especially as regards historical financial information, and control and independence of a business), combined with the welcoming of dual/multiple class share structures ('DCSS') or weighted voting rights without any sunset clause (save for pre-IPO institutional investors), creates genuine potential for more diversity and investment choice in UK capital markets through the listing of dynamic and high-growth companies in the UK.

13. But as such openness carries scope for the introduction of more complex corporate structures to UK capital markets, and less independent shareholder influence, transparency and accountability, the reforms plainly increase investor risk, especially for minority and passive investors.

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[15] Liability as regards prospectuses under s90 is due to be repealed and replaced by reg. 30, Public Offers and Admission to Trading Regulations 2024 ('POATR'), and forms part of the UK's new Designated Activities Regime ('DAR') which should be fully operative in 2025.

14. That these changes can or will be managed and mitigated by –

14.1. the retention of the previous rules regarding pre-emption rights[16], the 10% free float[17], and equity share voting rights[18],
14.2. the FCA retaining the power to refuse applications it considers would be detrimental to investors[19], and to suspend and cancel listings[20] and applications[21],
14.3. the FCA retaining the power of approval over prospectuses[22], and to require supplementary information from applicants, controllers, auditors and intermediaries as a condition of approval[23],
14.4. all new prospectuses needing to satisfy a new statutory 'necessary information test' aimed at ensuring investors receive material information about the issuer to help them make informed assessments of its financial position and prospects, and the rights attaching to the securities being offered[24] ,
14.5. prospectuses issued by overseas-registered applicants also generally still needing to set out historical financial information as a statutory requirement, and in accordance with UK and other international accounting standards[25],
14.6. issuers, directors and other persons responsible for prospectuses still being liable to pay compensation to investors who suffer loss for untrue or misleading statements or omissions, and to FCA enforcement action[26] (see below),
14.7. applicants still needing to appoint sponsors to vet applications[27], and who are themselves subject to FCA supervision[28],
14.8. applicants needing to confirm[29] through their board of directors that the company:
14.8.1. has taken reasonable steps to establish adequate procedures, systems and controls to enable the company to comply with the UKLR, DTR and corporate governance rules (LP1), and
14.8.2. has taken account of the guidance in UKLR on LP1 that the company's systems and controls should enable it to, among other things: identify whether any obligations arise concerning shareholder notification of significant, and related party, transactions, and voting on reverse takeovers; identify market-disclosable information, and to make timely and accurate market disclosures; and provide information to the FCA and/or a sponsor[30],
14.9. DCSS applicants needing a constitution which expressly aligns the interests of holders of enhanced voting shares to the company's prospects[31], and pre-IPO institutional investors being subject to the same transfer restrictions as natural persons holding enhanced voting shares and a 10-year sunset clause[32],
14.10. controlling shareholder ('CS') applicants still needing to demonstrate

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[16] UKLR 9.2.1R; UKLR 5.4.7R.
[17] UKLR 5.5.
[18] UKLR 5.4.2.
[19] ss75(4)-(5) FSMA; UKLR 3.1.2-3G.
[20] ss77(1)-(2) FSMA; UKLR 21.
[21] reg. 36 POATR.
[22] s87A FSMA; UKLR 3.2.10R.
[23] s87J FSMA; reg. 28 POATR.
[24] reg. 23 POATR.
[25] reg. 24 POATR.
[26] ss89K and 91 FSMA; regs. 39-40 POATR.
[27] UKLR 4.2.1R
[28] ss88-88A FSMA; UKLR 24.5.17G, and see (e.g.) *Cenkos Securities plc*, FCA Final Notice, 08/08/2016.
[29] UKLR 2.1.2G; 20.3.1R(1).
[30] UKLR 20.3.1R(1).
[31] UKLR 5.4.5R(1).
[32] UKLR 5.4.5R(2).

they can carry on their main business activity independently of the CS[33], a constitution that allows for the election and re-election of independent directors by the shareholders and independent shareholders of the company[34], and any resolutions put forward by a CS which a director considers are intended or appear to be intended to circumvent UKLR needing to be disclosed by the board to shareholders[35],
14.11. externally managed applicants still needing to satisfy the FCA that the discretion of their boards to make strategic decisions is not limited to a person outside their group, and the board has the ability to act on key strategic matters in the absence of a recommendation from such a person[36],
14.12. third country applicants still needing to have their shares listed in their country of incorporation or in the country in which the majority of their shares are held, unless the FCA is satisfied that the absence of the listing is not due to the need to protect investors[37], and
14.13. UKLR requiring UK-listed companies to pay due regard to their role in maintaining market confidence and fair and orderly markets[38], including :

14.13.1. co-operating with the FCA as and when necessary[39],
14.13.2. acting with integrity towards investors[40],
14.13.3. treating holders of the same class of securities equally[41],
14.13.4. avoiding the creation of a false market in the company's share price[42], and
14.14. UK CGC and UK SC expecting UK-listed companies and investors to engage with each other meaningfully and responsibly on a continuing basis[43],

are all clear, and provide a degree of reassurance for investors.

15. But when the reality is that information can always been withheld from a prospectus by an issuer, what is deemed 'necessary' to disclose is liable to different opinions, and the aims and objectives of UKLR are fundamentally to facilitate growth through the listing of more dynamic, diverse and, if appropriate, exotic corporate structures and entrepreneurs[44], the new framework clearly risks –

15.1. inadequate IPO due diligence and material information being concealed by applicants from the FCA and investors,
15.2. contentious or poorly-controlled companies entering UK capital markets and raising capital here,
15.3. more conflicts of interest between UK-listed companies, related parties and investors,
15.4. the misallocation of capital by UK-listed companies and the persons that own or control them (whether deliberate, inadvertent and/or concealed),
15.5. the erosion of trust and confidence between boards and investors, and between asset owners and managers and their clients and beneficiaries, and
15.6. more incidents of harm, financial loss, and other poor outcomes.

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[33] UKLR 9.2.1R; UKLR 5.4.7R.
[34] UKLR 5.5.
[35] UKLR 5.4.2.
[36] ss75(4)-(5) FSMA; UKLR 3.1.2-3G.
[37] UKLR 5.6.1R
[38] UKLR 2.1.3G.
[39] LP2.
[40] LP4.
[41] LP5.
[42] LP5.
[43] fns. 11-12 *ante*.
[44] CP23/31, p143, Cost Benefit Analysis at [63].

16. And this reality is only amplified by the new statutory exemption of civil liability for issuers, directors and other persons responsible for a prospectus to compensate investors for any loss caused by untrue or misleading 'protected forward-looking statements' ('PFLS') or omission from PFLS included in a prospectus as to projections, estimates forecasts and targets etc, unless such a person acted dishonestly[45].

(2) The more permissive approach to significant, and related party, transactions

17. While the removal, in UKLR, of prior mandatory shareholder vote for class 1[46] and class 2[47] transactions in favour of an after-the-event notification-based framework limited to 'significant transactions' (25%+[48]) aims to make a UK listing attractive (by enabling UK-listed companies to be strategically agile, and to compete more effectively in global M&A deals through the removal of regulatory burdens[49]), the effect is likely to leave many shareholders in the dark about important transactions affecting the value of their investments until the investee notifies the market about them.

18. That these changes are balanced by –

18.1. the continuing behavioural anchors of UK MAR and the Listing Principles ('LPs') concerning the UKLR, DTR, and corporate governance rules[50], and that UK- listed companies must have continuing regard to their role in maintaining market confidence and fair and orderly markets[51],

18.2. issuers still needing to take reasonable care to ensure any information disclosed by them is not misleading, false or deceptive, and does not omit anything likely to affect the import of the information[52],

18.3. UK-listed companies still needing to take reasonable steps to establish and maintain adequate systems and controls to enable them to comply with UKLR[53], and their directors needing to take reasonable steps to ensure adequate governance arrangements are in place and maintained at all times to enable the company to comply with LP1[54],

18.4. the FCA retaining its power to suspend or prohibit trading in listed securities for suspected breaches of DTR[55], and to seek voting rights suspension orders from the UK courts[56],

18.5. the probability of key shareholders still being wall-crossed about significant transactions in advance of their terms being agreed[57],

18.6. significant transactions needing to be disclosed to the market as soon as possible after their terms are agreed[58], together with detailed information about the transaction and any further information the company considers

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[45] Paras. 10-11, Sch 2, POATR; albeit civil liability for untrue or misleading PFLS, or omissions from PFLS, under s954 CA06, s382 and 384 FSMA, and for civil penalties and criminal liability, all remain.
[46] Transactions the value of which is 25%+ the company's value.
[47] Transactions the value of which is between 5%-24.99% the company's value.
[48] UKLR 7.1.3R.
[49] PS24/6, Foreword; CP23/31 at [6.50-61].
[50] UKLR 2.1.1R; UKLR 6.2.11-14R.
[51] UKLR 2.1.3G.
[52] UKLR 1.3.3R; DTR 1A.3.2R.
[53] LP 1.
[54] UKLR 2.2.3G.KLR 9.2.1R; UKLR 5.4.7R.
[55] s89L FSMA.
[56] s89N FSMA.
[57] DTR 2.5.7G.
[58] UKLR 7.3.1R(1).

relevant[59], completion disclosures[60] and, in connection with disposals, a fairness statement by the board that it considers the disposal to be fair to security holders in certain circumstances[61],

18.7. timely and detailed information concerning significant transactions needing to be disclosed by issuers so as to support engagement between them and shareholders, and enhance market transparency[62],

18.8. the reforms applying equally (in the main) to acquisitions, disposals and distressed companies[63], and contemplating the continued engagement of market notification experts[64],

18.9. UK CGC encouraging active board engagement with shareholders[65], and the identification and effective management of any conflicts of interest[66],

18.10. UK SC expecting investors and service providers to monitor and engage with issuers, and to challenge them, hold them to account on material issues, exercise rights and responsibilities for their clients and beneficiaries, and report what they have done[67],

18.11. shareholders still having residual powers to control UK companies and boards under the Companies Act 2006 ('CA06'), Part 13,

18.12. UK-incorporated company directors being bound by their fiduciary and other duties under ss170-177 CA06, and

18.13. shareholders being ultimately free to disinvest, or threaten to disinvest, their interests in an issuer,

is also all very clear, and should serve as important risk management tools and sources of discipline and leverage for investors and regulators.

19. But in circumstances where UK-listed companies will be free to undertake important transactions without being compelled to seek *ex ante* shareholder approval and take shareholder views into account, the disclosure framework is inherently after-the-event. Some of the same risk management tools have demonstrably failed to prevent misconduct historically, and UK company and financial services law is littered with examples of abusive behaviour. Harm will occur at some stage and questions will be raised as to whether and how smart it was to take off the brake of shareholder veto rights.

20. As regards related party transactions equating to 5%+ of a company's value[68], again, the removal of the prior mandatory shareholder vote and FCA-approved shareholder circular in UKLR in favour of a 'disclosure, plus enhanced governance'[69] philosophy, creates similar scope for real conflicts of interest and abuse.

21. That, as well as the mitigants applicable to significant transactions –

21.1. the purpose of the disclosure framework is to ensure shareholders are notified of related party transactions when they are entered into by a listed company, to support engagement between a company and its shareholders in relation to such transactions, and to enhance market transparency concerning the

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[59] Paras. 10-11, Sch 2, POATR; albeit civil liability for untrue or misleading PFLS, or omissions from PFLS, under s954 CA06, s382 and 384 FSMA, and for civil penalties and criminal liability, all remain.
[60] Transactions the value of which is 25%+ the company's value.
[61] Transactions the value of which is between 5%-24.99% the company's value.
[62] UKLR 7.1.3R.
[63] PS24/6, Foreword; CP23/31 at [6.50-61].
[64] UKLR 2.1.1R; UKLR 6.2.11-14R.
[65] UKLR 2.1.3G.
[66] UKLR 1.3.3R; DTR 1A.3.2R.
[67] LP 1.
[68] UKLR 8.2.1R.
[69] CP23/31 at [9.6].

same[70], and to prevent a related party from taking advantage of its position[71],
21.2. before entering a disclosable related party transaction, a board needs to appoint a sponsor[72] to independently confirm that the transaction is fair and reasonable to security holder[73],
21.3. boards are themselves required to approve such related party transactions as fair and reasonable to security holders[74],
21.4. any conflicted director is to be excluded from a board's consideration of the transaction and from voting on it[75], and
21.5. companies need to notify the market about the transaction as soon as possible once its terms are agreed[76], and include the fairness statement referred to above, essential details about the transaction[77], and any further information relevant to the purpose of the rules on disclosable related party transactions[78],

each serve to mitigate investor fears to a degree. But the inherent vulnerabilities associated with after-the-event notification of important transactions affecting the value of an investment will undoubtedly persist.

III. POTENTIAL LIABILITIES OF ISSUERS AND THEIR DIRECTORS

ss90-90A of and Schedule 10A to FSMA

22. Currently, s90 FSMA is the statutory regime imposing civil liability for claims in relation to untrue or misleading statements or omissions contained in prospectuses and listing particulars[79].

23. Under s90, any person (including issuers and directors) responsible for such statements (or supplementary prospectuses or listing particulars) is liable to pay compensation to a person who has acquired relevant securities and suffered loss as a result of any untrue or misleading statement, or the omission of any matter required to be included. Negligence is sufficient to establish liability for these 'selling documents'[80]. Exemptions from liability are provided by Sch 10 to FSMA. These include that the person responsible for an offending statement reasonably believed that the statement was true and not misleading or that an omission was properly omitted (para 1), that a correction was published before the securities were acquired (para 3), and that the alleged loser knew the statement was false or misleading, or knew of the matter omitted (para 6).

24. In parallel, s90A FSMA concerns periodic reports and *ad hoc* information published by issuers via 'recognised means'.

25. s90A states that the relevant operative provisions are contained within Sch 10A to FSMA. Here, an issuer is liable to pay compensation to a person who acquires, continues to hold or disposes of securities in reliance on such published information, where that person suffers loss in respect of the securities. The loss must be suffered as a result of any untrue or misleading statement or omission, or delay in the publication of a matter required to be included in the published information.

[70] UKLR 8.1.2G.
[71] UKLR 8.1.3G.
[72] UKLR 4.2.1R(6); UKLR 8.1.4G.
[73] UKLR 8.2.1R(3).
[74] UKLR 8.2.1R(1).
[75] UKLR 8.2.1R(2).
[76] UKLR 8.2.1R(4).
[77] UKLR 8.2.2R.
[76] UKLR 8.2.3R.
[79] As noted above, liability as regards prospectuses under s90 is due to be repealed and replaced by reg. 30 POATR. What follows is largely duplicated in POATR.
[80] ACL *Netherlands BV v Lynch and Hussain* [2022] EWHC 1178 (Ch) ('*Autonomy*') at [437].

The claimant must have suffered loss by relying on the information, but only where that reliance was reasonable. In contrast to s90, issuers are liable under s90A/Sch 10A only if a person discharging managerial responsibilities ('PDMR') at the issuer knew that or was reckless as to whether the offending statement was untrue or misleading, or knew the omission to be a dishonest concealment of a material fact. In the case of delaying the publication of information, issuers are liable if a PDMR acted dishonestly in delaying said publication. Essentially, dishonesty on the part of a PDMR needs to be proved[81].

26. Certain liabilities are excluded under Sch 10A, para 7, but these do not affect liability under s90 FSMA/reg.30 POATR, or for breach of contract and under the Misrepresentation Act 1967, or for negligence, or concerning any regulatory or criminal liability.

27. In this context, UKLR broadly affects the liability of issuers and directors in three ways[82]:

27.1. Existing s90 liability in relation to prospectuses and listing particulars,
27.2. Existing s90A liability in relation to periodic reports and *ad hoc* notifications, such as annual and interim accounts under DTR 4 and UK MAR/DTR 2 disclosures, which will likely be subject to enhanced scrutiny by investors, and
27.3. New s90A liability that may be attached to published information as a result of the new significant, and related party, transaction ESCC notification regime[83].

28. Removing prescriptive rules for admission removes the need for issuers to publish certain information which may otherwise be subject to investor scrutiny and potential s90 claims. As historical financial information requirements and revenue earning track record are generally no longer required as part of the eligibility for admission to the ESCC category[84], an existing avenue of legal recourse available to shareholders has been removed, albeit this will be replicated in part by POATR.

29. On the flip side, higher levels of scrutiny will be placed on any information the company publishes beyond a prospectus. As prospective investors make an assessment of what the future prospects of the applicant's business might be, issuers' and directors' existing risk in relation to prospectuses (s90/reg. 30 POATR) and other published information (s90A/Sch 10A, issuers only) will be heightened; every market announcement being potentially subject to a Sch 10A claim.

30. Typically, ss90-90A/Sch 10A claims have arisen as a result of the publication of a corporate scandal which causes a sudden drop in an issuer's share price. Without information being made public by a third party - for example a regulator or law enforcement agency - investors have been largely shielded from the key information underpinning these claims. Claims have tended to fall under two heads: (1) not publishing relevant information, leading an issuer to make omissions or untrue or misleading statements, and (2) statements published purporting to confirm good and compliant corporate practice at an issuer, for example in a prospectus or annual report, but which are in fact untrue or misleading in light of facts revealed by enforcement or other legal action[85].

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[81] *Autonomy at* [467]; *Various Claimants v G4S Limited (formerly G4S PLC)* [2022] EWHC 1742 (Ch) at [3].
[82] As to how POATR affects persons responsible for PFLS in prospectuses, see para. 16 above.
[83] UKLR 7.3 and 8.2.
[84] UKLR 5.
[85] See (e.g.) *Aabar Holdings SARL and Ors. v Glencore plc, Glasenberg and Ors.* [2024] EWHC 1556 (Comm).

31. The current primary risk for issuers in relation to being on the receiving end of ss90-s90A/Sch 10A claims under UKLR is a poor corporate governance culture and ineffective risk management controls, by which harmful or unlawful practises occur, or are at risk of occurring. Issuers and directors need to be alert to this vulnerability, which can often relate to a lack of management information and active board control and supervision, as well as complex share, and operating, structures.

32. LP1 mandates that:

"A listed company must take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations."

When seeking admission, applicants must provide board confirmation that they have taken reasonable steps to establish adequate procedures, systems and controls[86], and this is a continuing obligation[87]. If a fall in share price can be linked to the discovery of inadequate procedures, systems and controls (as most historic claims are), either at admission or subsequently, companies and their directors must brace themselves for s90/reg.30 POATR and s90A/Sch 10A claims.

33. In relation to significant, and related party, transactions, it might be thought that the new notification regime under UKLR 7.3 and 8.2 could be ripe for shareholder litigation under s90A, should a transaction cause shareholders loss and any information contained in the applicable disclosure be untrue, misleading or contain a material omission. Issuers will clearly need to ensure that UKLR 7.3 and the applicable annexes, as well as UKLR 8.2, are diligently complied with to prevent such claims. That said, absent evidence of dishonesty by a PDMR, any s90A claim relating to an untrue or misleading statement in, or omission from, a significant or related party transaction notification would seem to be conspicuously ambitious.

34. Conversely, if an investor were to sell their securities in an issuer in reliance on a market disclosure regarding a significant or related party transaction, and it later transpires that the notification fulfilled the Sch 10A requirements regarding the veracity of statements made, and the value of the issuer's shares increased, an investor may have grounds to bring a claim under Sch 10A for the loss. Whether this would occur remains to be seen, but this illustrates how shareholders may be encouraged to mitigate for their increased risk profile under UKLR with arguably novel and 'loss of a chance' claims.

35. Of course, without initiating litigation, shareholders have other means available to them if they dissatisfied with a decision of directors. Members representing at least 5% of the total voting rights may require the directors to call a general meeting of the company[88]. Further, under s168 CA06, there is an absolute right to dismiss a director by ordinary resolution.

Corporate Governance reports

36. Under UKLR, UK CGC applies to all UK-incorporated companies listed in ESCC[89].

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[86] UKLR 20.3.1 R; 2.1.2 G.
[87] UKLR 2.1.1 R; 2.2.2 G; 6.2.11-14.
[88] s303 CA06.
[89] UKLR 6.6.6R(5-6).

For companies previously listed in the standard category, they will now need to release corporate governance statements explaining how they have applied the Principles of UK CGC and either complied with UK CGC Provisions, or explained why they have not. Such narrative reports may also provide the basis for a Sch 10A claim[90] and issuers and investors will be alive to this as issuers switch listing categories. As corporate governance and climate-related reporting is undoubtedly a growth area for litigation, issuers are likely to face s90A/Sch 10A claims concerning misleading ESG statements[91]. As investors have an increasing tendency to invest with environment mandates in particular, reliance on ESG narrative reports and statements would still need to be demonstrated for these claims.

Key takeaways from recent judgments on ss90-90A claims

37. Securities litigation, especially group litigation, is a burgeoning field in the UK, and UKLR is likely to add fuel to the fire that some corporates have been feeling. Shareholders naturally form a class for group litigation purposes. As a result of limitations on extraterritorial application of US securities law (*Morrison v National Australia Bank Ltd* 561 U.S. 247 (2010)), alternate jurisdictions are an increasingly attractive venue for international securities class actions. The growing availability of litigation funding in England is further driving its expansion here[92].

38. To date, the only s90A claim to have been brought to trial and receive judgment is *Autonomy*. The judgment addressed some important points in relation to s90A claims, but the case was also unique in that it concerned the takeover of an issuer. The ratio is therefore confined to circumstances which diverge from the rest of the cases currently progressing through the courts. The remainder of published judgments on s90A/Sch 10A are case management decisions, or in the case of *G4S*, determination of a discrete issue (the definition of a PDMR)[93]. The value of the claims, and issues that arise to be resolved in CMCs, demonstrate that s90A/Sch 10A claims run-up substantial cost and expense on all sides, involve extensive factual investigation and determination, and complex and novel legal questions concerning the interpretation of Sch 10A, all of which is compounded by the group litigation context.

39. One of the main issues that awaits judgment is the level of reliance permitted under Sch 10A. As is apparent from the CMC judgments, issues that await resolution by the courts are whether reliance needs to be based on specific statements in published information compared to reliance on published information as a whole. In *Autonomy*, the court held that reliance must be on a specific statement, and that it must have impacted on the mind and judgement of a claimant[94]. A further issue is that of indirect reliance (both market and price reliance), and the validity of relying on the price of shares and believing that to reflect their value. This is especially pertinent for tracker funds[95], and passive funds where

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[90] *Autonomy at* [438(3)].
[91] See (eg.) *Drax Group plc*.
[92] Progress of the Litigation Funding Agreements (Enforceability) Bill has been stopped with the prorogation of Parliament and general election. The aim was to reverse the Supreme Court's decision in *R (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28.
[93] *Allianz Global Investors GmbH v G4S Ltd (formerly GS4 Plc)* [2022] EWHC 1081.
[94] *Autonomy at* [515].
[95] *Various Claimants v G4S Limited (formerly G4S PLC) [2022] EWHC 1742 (Ch) at [47] and [48]; Various Claimants v Serco Group plc* [2022] EWHC 2052 (Ch) at [16].

their standing to sue under s90A is being rightfully challenged[96].

40. With regards to case management, a comparatively consistent approach is being taken by the courts to the issue of split trials. Generally, the common and discrete factual issues of the untrue or misleading statements or omissions, and whether a PDMR had 'guilty knowledge'[97], are being allotted to Trial 1, together with a claimant's standing. Trial 2 covers individual issues related to claimants: reliance, causation, loss and quantum, and limitation, albeit specific reliance questions may be included in Trial 1 (see, for example, *RSA* and *Standard Chartered*)[98]. As noted, none of the s90A claims have yet proceeded to trial, so how practical this split is yet to be seen.

41. As stated, the meaning of PDMR under para 8 of Sch 10A has been considered by the Chancery Division. In *G4S*, the court was tasked with determining the proper construction of the term for the purposes of liability under s90A/Sch 10A. The defendant issuer had applied for strike out of the claimant's case and/or summary judgment. The court held that the definition in para 8(5) of Sch 10A is clear and unambiguous and should be given its natural meaning. When an issuer has directors, only directors can be PDMRs (albeit this might embrace *de jure, de facto* and shadow directors)[99], and whether any person is actually a *de facto* director of an issuer would currently seem destined to be determined at trial, on the basis it is an intensely fact specific exercise[100].

42. All of the above simply underlines the point that, under UKLR, UK-listed companies and their directors need to be alert to the uncertainty surrounding the legal parameters of ss90-90A and Sch 10A claims, that investors may challenge corporate assertions of legal professional privilege to withhold relevant information by issuers under the 'shareholder principle'[101], and that these claims require considerable time and resource until the parties are ready to contemplate a settlement or proceed to trial.

FCA regulatory enforcement action

43. The FCA has multiple statutory powers enabling it to regulate and enforce breaches of UKLR, PRR, DTR and UK MAR by issuers, directors and sponsors.

44. Pursuant to s91 FSMA (reg. 40 POATR, in due course), the FCA has the power to impose financial penalties on applicants and issuers for a breach of UKLR, the corporate governance rules (and in due course POATR), as well as any 'relevant officer' of an issuer (director or similar) who was knowingly concerned in the breach.

45. As stated above, LP1 requires a UK-listed company to take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations. LP4 requires a listed company to act with integrity towards the holders and potential holders of its securities. And UKLR 1.3.3R requires an issuer to take reasonable care to ensure that information it publishes is

[96] See (eg.) *Allianz Funds Multi-Strategy Trust & Ors v Barclays Bank Plc* [2023] EWHC 2015 (Ch). The court exercised its discretion to grant permission to amend the names of claimants and to substitute new claimants where the threshold conditions in CPR r.17.4 or r.19.6 were satisfied. Judgment is awaited as to whether passive funds that buy shares automatically on an issuer's inclusion in market indices have standing to sue.
[97] *Autonomy at* [448].
[98] *The Persons identified in Sch 1 v RSA Insurance Group Plc* [2021] EWHC 570 (Ch); *Persons Identified in Schedule 1 v Standard Chartered Plc* [2024] EWHC 1108 (Ch).
[99] *G4S* at [140].
[100] *G4S* at [173] and [174].
[101] *Allianz Global Investors GmbH v G4S Ltd (formerly GS4 Plc)* [2023] EWHC 2863 (Ch) at [2]; *Aabar Holdings & Ors v Glencore & Ors* [2024] EWHC 1556 (Comm) at [180] to [195].

is not misleading, false or deceptive and does not omit anything likely to effect the import of the information. This requirement is repeated in DTR 1A.3.2R. Failings in each of these fundamental areas have led to multiple FCA enforcement actions and penalties; and the £37mn financial penalty imposed in *Carillion*[102], the fines imposed against its former CEO and finance directors[103], and the £10mn penalty imposed on *Metro Bank*[104] underscore that the FCA should be expected to enforce any material rule-breaking following the reforms robustly to protect the integrity of UK capital markets.

46. Arts. 14-15 UK MAR prohibit insider dealing, the unlawful disclosure of inside (price-sensitive) information, and (more relevantly) market manipulation through the dissemination of information which is likely to secure an artificial share price for an issuer's securities (collectively, market abuse). UK MAR is the UK's civil market abuse regime, and operates alongside a separate criminal enforcement regime (see below), as well as the UKLR and DTR. Pursuant to s123 FSMA, the FCA has the power to impose financial penalties on issuers and other persons for breaches of UK MAR. Again, *Carillion* and *Gent*[105] demonstrate that penalties can run to many millions of pounds.

47. Art. 17 UK MAR requires issuers to inform the public as soon as possible of inside information directly concerning the issuer. This requirement is repeated at DTR 2.2.1A. *Woolworths Group plc*[106] and *Tejoori*[107] demonstrate the FCA will issue penalties for a breach of this rule.

48. s381 FSMA enables the FCA to seek an injunction where there is a reasonable likelihood that any person will contravene arts. 14-15 UK MAR, and under s384 FSMA the FCA can order a person who has contravened them, or any other relevant requirement, to pay restitution to persons who have suffered loss as a result. In comparison to s90A, liability under s384 is broader for an issuer, and the penalties imposed on *Link Fund Solutions* (£298mn)[108], *Tesco*[109], and *London Capital & Finance plc*[110], demonstrate that the FCA will use this power where necessary.

49. The FCA consistently highlight that issuers must have adequate procedures, systems and controls in relation to obligations under UKLR 7 and 8, as well as the timely and accurate disclosure of information to the market[111].

50. Considering that a less prescriptive regulatory regime will apply following the implementation of UKLR, listed companies will inevitably focus carefully on their obligations under art. 17 UK MAR. Directors and issuers will need to be alive to the fact that any disclosures made in accordance with the DTR 2 and art. 17 will be scrutinised intensely. As has occurred historically as standard practice, issuers will need to continue to ensure that they are monitoring the creation of inside information and considering whether it needs to be disclosed.

51. Additionally, as the regulatory regime shifts to fewer prescriptive rules and more onus is placed on companies to

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[102] *Carillion plc (in liquidation)*, FCA Decision Notice, 24/06/2022. The fine was not imposed due to Carillion's financial circumstances.
[103] FCA Decision Notices, 24/06/2022, *Richard Howson*, *Richard Adam* and *Zafar Khan*.
[104] *Metro Bank plc*, FCA Final Notice, 8/12/2022.
[105] *Sir Christopher Gent*, FCA Final Notice, 5/08/2022.
[106] *Woolworths Group plc*, FSA Final Notice, 11/06/2008.
[107] *Tejoori Limited*, FCA Final Notice, 13/12/2017.
[108] *Link Fund Solutions Limited*, FCA Final Notice, 11/04/2024.
[109] *Tesco plc and Tesco Stores Limited*, FCA Final Notice, 28/03/2017.
[110] *London Capital & Finance plc*, FCA Final Notice, 11/10/2023.
[111] UKLR 2.2.2G.

disclose relevant information at the required time, companies will need to be mindful of information that previously fell into a specific part of the listing regime, which will now need to be disclosed under UK MAR. For example, information concerning a previous class 2 transaction, or related party transaction between 0.25% and 5%. As these are no longer subject to specific prescribed notifications, art. 17 disclosures may become a proxy. The FCA has indicated in PS24/6 that issuers could use UKLR 7.3 and the applicable annexes as a helpful guide for the type of information to be released under a standard UK MAR notification in relation to transactions of this size[112].

52. In relation to significant transactions, and the fact that boards may likely wish to engage key shareholders before deciding to go ahead with a transaction, obligations under UK MAR must be considered, especially if a board intends to conduct a market sounding/wall-crossing. The FCA has made amendments to DTR 2.5.7G confirming that an issuer may be justified in disclosing inside information when contemplating a major transaction to ensure its viability. This is permissible so long as the recipients are bound by a duty of confidentiality. As noted in DTR 2.5.9G, issuers should bear in mind that the wider the group of people, the greater the likelihood of a leak which could trigger a full disclosure under art. 17(8) UK MAR. In this regard, Gent is a useful warning as to where the FCA considers the threshold lies, and the type of questions that the FCA considers directors and others need to be asking themselves to ensure they keep to the right side of the line.

Suspension and cancellation of listings

53. The FCA enjoys extensive powers of suspension and cancellation under Part 6 FSMA. Under s77 FSMA, the FCA may discontinue the listing of any securities if is satisfied that there are specific circumstances which preclude normal and regular dealings with them. The FCA also has the power to suspend the listing of any security under this provision. In relation to admission, under s87L FSMA, if the FCA has reasonable grounds for suspecting that an applicable provision has been infringed the FCA has power to suspend, restrict or prohibit admission to trading. Applicable provisions concern Part 6 FSMA, and the prospectus rules[113].

54. The FCA has further powers under UKLR. For example, the FCA may suspend listing if the smooth operation of the market is or may be temporarily jeopardised[114]. Behaviour which may meet this criteria includes an issuer failing to meet the continuing obligations for listing, or if there is insufficient information in the market about a proposed transaction[115]. As issuers get to grips with the amended rules - for example, the continuing obligations surrounding a controlling shareholder[116] - they should be mindful that a failure to comply can result in suspension. Similarly, if issuers are not making sufficient disclosures in relation to transactions, of which the rules have significantly shifted, suspension may be utilised.

55. The FCA also possesses specific suspension powers to protect the market when transparency obligations have been infringed, for example under s89L FSMA. Under s122I FSMA the FCA may suspend trading of a financial instrument where it

[112] PS24/6 at [5.24]
[113] And these are duplicated and extended by regs. 35-37 POATR.
[114] UKLR 21.1.1R.
[115] UKLR 21.1.2G.
[116] UKLR 6.2.10R.

considers it necessary for the purpose of its functions under UK MAR. Under DTR 1.4.4G, examples of when the FCA may require suspension include if an issuer fails to make an announcement as required by UK MAR within time and the FCA considers this could affect the interests of investors or affect the smooth operation of the market. Having explored market soundings with significant transactions and the relaxed rules surrounding smaller transactions, failure to comply with existing market protection mechanisms may also result in suspension.

Criminal prosecution under ss89-90 FSA 2012

56. The primary components of the parallel criminal enforcement regime are contained in Part V of the Criminal Justice Act 1993 (insider dealing) and Part 7 of the Financial Services Act 2012 (market manipulation).

57. ss89-90 FSA 2012 constitute the current criminal offences for market manipulation[117]. Under s89 FSA 2012, a person commits an offence if they make a statement which they know to be or are reckless as to whether it is false or misleading, or they dishonestly conceal a material fact, with the intention of inducing, or is reckless as to whether it may induce, another person to enter or refrain from entering an agreement or exercise or refrain from exercising a right conferred by an investment. Under s90 FSA 2012, a person commits an offence if they create a false or misleading impression as to the market or price of an investment. Offences under ss89-90 FSA 2012 may be committed by natural or legal persons. A defence available under s90 (but not s89) is that the person reasonably believed that their conduct would not create an impression that was false or misleading.

58. Unlike Sch 10A to FSMA, issuers, directors and other persons may find themselves liable under ss89-90 FSA 2012, as the prosecution of the former CEO, CFO and finance director of *Redcentric plc* merely underlines[118]. As more wall-crossings and disclosure of inside information to investors may well occur under UKLR in response to the removal of shareholder votes, issuers will need to be cautious to avoid committing market manipulation by making false or misleading statements, or being reckless as to whether they have done so. Issuers and boards must be especially cautious, as recklessness as to whether a statement is false or misleading is permissible under s89 FSA 2012. Although dishonesty is again required, should a person fail to make reasonable enquiries into disclosure, culpability may be established.

59. The penalties for the ss89-90 FSA 2012 offences on indictment are a maximum of 10 years' imprisonment, a fine or both; and compensation and confiscation orders may be imposed. Both offences are 'relevant offences' for the purpose of s196 of and Sch 12 to the Economic Crime and Corporate Transparency Act 2023 by which companies may now also be held criminally liable. Plainly, any proceedings instituted by the FCA under ss89-90 FSA 2012 could trigger parallel civil enforcement action, and Sch 10A FSMA claims.

Company directors disqualification under CDDA

60. In tandem with the above civil, criminal and regulatory liabilities, UK-listed companies and their directors are potentially liable to investigation and enforcement action by the UK Insolvency

[117] The prosecution of two directors in *R v Bailey and Rigby* [2005] EWCA Crim 3487 for misleading statements connected with profit forecasts was under s397 FSMA, the predecessor to ss89-90 FSA.[113] And these are duplicated and extended by regs. 35-37 POATR.
[118] *R v Coleman and Ors*, unreported.

Service ('IS') for behaviour deemed to be market abuse.

61. The IS is an executive agency of the Department for Business, Energy and Industrial Strategy ('BEIS'), and fulfils a range of statutory functions and exercises powers and duties on behalf of the Secretary of State under, among other things, the Companies Acts 1985 and 2006, Insolvency Act 1986 ('IA 1986'), and the Company Directors Disqualification Act 1986 ('CDDA').

62. Under s447 of the Companies Acts 1985, the IS has the power to investigate the affairs of a company where there is reason to believe its activities are being conducted in a manner contrary to the public interest. Under s124A of the IA 1986, the IS has the power to petition for the winding up of companies where it is in the public interest, and under s8 CDDA, it has powers to seek the disqualification of a director or shadow director of a company, where it appears expedient in the public interest to do so. Relevantly, the FCA and IS have signed a memorandum of understanding ('MoU') to share intelligence and information to tackle corporate and financial misconduct, and the MoU makes it clear that the IS may use information and evidence obtained by the FCA when exercising its statutory power[119].

63. Under s124A of the IA 1986, a company is liable to be wound up if it is expedient in the public interest to do so where its business is inherently objectionable, because its activities are contrary to a clearly identified public interest and/or lack commercial probity[120]. As a result, it is not difficult to conceive of a case where a serious breach or breaches of the UKLR, PRR, DTR and UK MAR by a UK-listed company could satisfy this test.

64. Under s8 of the CDDA, the courts have a discretion to make a disqualification order against a director or shadow director of a company, where it is satisfied that their conduct in relation to the company makes them unfit to be concerned in the management of a company. The matters to be taken account in the court's assessment are set out at Sch 1 to CDDA and include the extent to which the director etc was responsible for the causes of any material breach of any applicable legislative or other requirement (para 1), the nature and extent of any loss or harm caused, or any potential loss or harm which could have been caused, by their conduct (para 4), any misfeasance or breach of fiduciary duty by the director in relation to a company (para 5), and any material breach of any legislative or other obligation of the director which applies as a result of being a director (para 6).

65. Given the heightened importance of the role of the board of directors under UKLR, DTR, and the corporate governance rules (and especially the UK CGC), and scope for substantial loss and harm, or potential loss and harm, to be caused by directorial conduct in relation to any breach of their duties, here, *Carillion* underlines the importance of the MoU signed by the FCA and IS, and that the IS can be expected to investigate and seek disqualification orders and undertakings against directors and/or an entire board of a UK-listed company in connection with conduct relating to serious breaches of UKLR, DTR and UK MAR[121].

IV. POTENTIAL MITIGANTS TO AVOID OR REDUCE LIABILITY

s90 and Schedule 10A FSMA

66. Companies need to ensure that all

[119] https://www.fca.org.uk/publication/mou/mou-insolvency-service.pdf
[120] *Re PAG Management Service Limited* [2015] EWHC 2404 (Ch).
[121] *Secretary of State for Business, Energy and Industrial Strategy v Adam & Ors.* [2022] EWHC 922 (Ch).

disclosures and announcements are accurate, defensible, and supported by good internal record-keeping and governance to audit and evidence the basis for making the statements in the first place.

67. The board should ensure the independence and effectiveness of internal and external audit functions and satisfy itself on the integrity of financial and narrative statements[122]. The audit committee has a particular role, acting independently from the executive, to ensure that the interests of shareholders are properly protected in relation to financial reporting and internal control[123]. However, it is the responsibility of management, not the audit committee, to prepare complete and accurate financial statements and disclosures[124]. For statements made in narrative reports, where the content is firmly within the remit of the director, the statement or opinion of an auditor is unlikely to be a safe harbour[125]. Obtaining professional advice will often enable directors to ensure that they have sufficiently carried out due diligence.

Significant transactions

68. One of the most obvious yet important measures a board can take in relation to mitigating their risk in respect of significant transactions is to make a good decision. Governance processes surrounding decision making at board level may need to be reviewed, and if necessary, enhanced. Making a good decision relies upon a company having good corporate governance, specifically a healthy culture of robust discussion and challenge and active and effective engagement by the board with shareholders. As noted by the FCA, removing shareholders' ability to veto significant transactions places more emphasis on boards to make decisions that preserve or increase shareholder value.

69. The decision-making process should be recorded contemporaneously, including reasons for making the decision, factors that were considered but dismissed and evidence relied on in the process. The guidance published by the FRC to accompany the UK CGC 2024 provides good advice that boards can use to assess the strength of their decision-making processes. Shareholders should be engaged with through legitimate avenues early and boards should ensure that the decision-making process is not shielded from shareholder views (as well as complying with their duties under (e.g.) ss172 and 174 CA06).

70. To support effective guidance, debate and discussion, a board needs to be satisfied that it is receiving timely and accurate information. When one option has been chosen as the decision of the board, despite strong factors pointing in a different direction, this should be recorded with reasons. Such a process provides a strong indication of (1) a thorough and thoughtful decision making process and (2) that 'X' important factor was in fact considered[126]. Further, in relation to the interests of various shareholders and stakeholders, in the case of complex

[122] UK CGC Principle M.
[123] UK CGC Guidance at [181].
[124] UK CGC Guidance at [190].
[125] *Autonomy at* [476].
[126] In the context of s172 CA 06, see (eg.) *Re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch) at [92]: "*Failing to take into account a material factor is something which goes to the validity of the directors' decision-making process. This is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the directors made at the time; rather it is the court making an (objective) judgment taking into account all the relevant facts known or which ought to have been known at the time, the directors not having made such a judgment in the first place*."

decisions directors need to be able to explain how impacts on affected stakeholders have been considered, complying with their s172 CA06 duty.

71. Disclosures made or omitted from the enhanced market notification should be carefully scrutinised and it is advisable that boards should continue to seek professional advice in this area. This is especially pertinent considering a sponsor is no longer required for significant transactions. Professional advice is an especially important mitigant: in relation to s90A/Sch 10A FSMA, there is a requirement for actual knowledge, and honest belief in the truth of a statement defeats a claim of recklessness, relevant to s89 FSA 2012 allegations. For allegedly misleading statements and omissions, a court will consider any advice given to the company and its directors from professionals. Even if a court takes the view that disclosure of the fact was required, the requirement for dishonesty is unlikely to be satisfied where the director was acting in accordance with the advice of reputable professionals[127].

72. Effective shareholder engagement should run through a company, a facet that will be especially important for companies with weighted voting rights to ensure that boards are not insulated from investors opinions. The chair of the board has an important role in fostering constructive relations with major shareholders. However, smaller investors should also not be overlooked and companies may want to consider how they too can be engaged with, for example though shareholder roundtables or sandboxes. Ultimately, it is important that shareholders are able to effectively discharge their stewardship duties if they wish, the formal way of doing so being at shareholder meetings and the AGM[128].

Market Abuse (UK MAR, DTR, FSMA, ss89-90 FSA 2012, suspension & cancellation of listing)

73. As is evident from the extensive criminal and civil market abuse regimes, having adequate systems and controls in place to identify and disclose inside information in good time, and to review the accuracy of information disclosed, are imperative. Issuers should assess whether the procedures, systems, and controls they have put in place to comply with their obligations under UK MAR for identifying and handling information remain adequate to mitigate for heightened risks that may arise from the reforms. This may be an opportune time for a risk assessment. When conducting a review, issuers should note the remedial action taken in response to any identified deficiencies or gaps. It may also be a good moment to review training of employees who have access to inside information to ensure their knowledge of the applicable obligations is up to date.

74. The likely risk of infringement of art. 17 UK MAR under UKLR is heightened in the new disclosure landscape, so this is an area boards should focus on to mitigate such risks. For example, under DTR 2.6.1G, issuers should establish effective arrangements to deny access to inside information other than those who require it. Further, issuers must make sure they are complying with their obligations to draw up and update an insider list under

[127] Relevant to this is Keay on Director's Duties (4th Ed.) at [6.190], citing J Loughrey, A Keay and L Cerioni, Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance (2008) 8 Journal of Corporate Law Studies 79 at 103: "*The more detailed, complete, and structured the board's explanation is, and the more the board's approach relies on professional advice and rational performance benchmarks, and adopts an integrated legal, economic-financial and social view, the more likely it is that shareholders will be advised that they will be unable to establish that directors have breached s 172 of the CA 2006*". The same is clearly apposite to all board decision-making concerning market disclosures.

[128] UK CGC Guidance at [36-38].

UK MAR, art. 18. When wall-crossing confidential information under DTR 2.5.7G, good-record keeping is essential to gaining protection and ensuring effective compliance. Issuers should follow and pay heed to the advice published by the FCA in their Market Watch newsletters, which make observations on market conduct and transaction reporting issues.

75. The headline change in the UK CGC 2024 is another area issuers would be advised to pay close attention. The changes to Provision 29 (coming into force on 1 January 2026) provide a stronger basis for companies to evidence the effectiveness of their internal controls, thereby enhancing transparency and investor confidence. Effective risk management is essential to a company's success in achieving its objectives and is conspicuously the responsibility of the board. Boards should review their risk management and internal control framework, ensuring that it operates as an integral part of the company's day-to-day business and governance processes.

V. CONCLUSION

76. In CP23/31 and PS24/6, the FCA's Chief Executive and Executive Director of Markets and International candidly recognise that the re-balancing of risk under UKLR may mean more failures as part of ensuring that the market overall supports the risk appetite the UK economy currently needs. The FCA believes such cases may be limited.

77. Such openness is commendable, but it is a clear acknowledgement of the potential pitfalls ahead for companies, their directors and investors, and the FCA itself, should the reforms help the LSE regain its allure and prove a catalyst for more UK-listed debutants.

About the author

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Robin is praised in the legal market as having "*the brain of a commercial Silk and the court-craft of a criminal one*" and as being "*a class act*" and "*very impressive on his feet*".

He specialises in advocacy and advice in commercial, criminal, regulatory and public law disputes in court, in arbitration, and in regulatory tribunals, in cases with domestic and international elements.

Robin is ranked by the legal directories as a Leading Silk in nine practice areas. This reflects the breadth of his expertise in areas which often intersect including: UK listing, market abuse and financial services regulation; company law and directors' duties; fraud, financial crime and sanctions; public law; and professional misconduct.